71-1422

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971
No._____

MURRAY KAPLAN,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The petitioner, Murray Kaplan, was convicted of a violation of §311.2 of the Penal Code of the State of California, which provides as follows:

> "Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to

others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor.

"(b) The provisions of this section with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to a motion picture operator or projectionist who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place wherein he is so employed."

Subsequent to being sentenced petitioner took an appeal to the Appellate Department of the Superior Court of the State of California. The Appellate Department affirmed petitioner's conviction and certified the case to the District Court of Appeal. The District Court of Appeal denied certification and returned the case to the Appellate Department, whereupon petitioner's

appeal became final under California law (California Rules of Court, Rules 24(a) and 28(b).)

STATEMENT OF THE EVIDENCE

On May 14, 1969, petitioner sold a book entitled Suite 69 to Los Angeles Police Sergeant Don Shaidell. Shaidell had been a police officer for 16-1/2 years, and had been assigned to the Administrative Vice Division for six years, working exclusively on pornography investigations (R.T. 34-35). Prior, he had worked as a general vice investigator for two years.

On May 14, 1969, Shaidell entered a so-called "adult bookstore" on West Pico Boulevard in the City of Los Angeles at about 11:50 a.m., in response to citizen complaints (R.T. 53).

Petitioner was operating the bookstore at the time, and Shaidell asked him if he had any sexy books (Shaidell was in an undercover capacity and his identity as a police officer was unknown to petitioner). Petitioner showed Shaidell a picture and said, "Look at this. You can see right inside her cunt." (R.T. 54). Petitioner

also told Shaidell all the books in the store were sexy.

Shaidell then asked petitioner if he had any real good paperbacks, to which petitioner replied, "I'm reading a real good book right now. It's called 'Suite 69'." Whereupon petitioner opened the book to pages 84 and 85 and read to Shaidell from the book (R.T. 54-55). Shaidell then purchased the book "Suite 69" and left.

The portion of "Suite 69" read by petitioner to Shaidell to induce the purchase consisted of a statement by one female character to another female, posed in vulgar, gutter language, instructing on and encouraging an act of oral copulation on one by the other, and the physical effect thereof on the copulatee.

Hubert Blackwell, who qualified as an expert witness, testified that the book "Suite 69", taken as a whole predominantly appealed to the prurient interest of the average person in the state of California, applying contemporary standards, and went substantially behond customary limits of candor in the State of California in

description and representation of such matter. Blackwell also explained specifically how the book did so, that it was a purveyor of sex for sex sake (R.T. 142).

Petitioner called as a witness Frank Laven, an attorney specializing in the defense of pornography cases, who testified that in his opinion "Suite 69" neither appealed to prurient interest nor went beyond customary limits of candor in the State of California. He also opined that the book had social value in that a reader could learn about sex, and because it had entertainment value.

I

THE BOOK "SUITE 69" IS OBSCENE AND IS NOT PROTECTED UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Petitioner contends that the book "Suite 69" is not obscene but rather is entitled to constitutional protection. Respondent submits that a review of the evidence, including a reading of the book in question, clearly demonstrates that the book is obscene and thus is not

constitutionally protected.

Although freedom of expression by means of the written word is guaranteed by the First Amendment, it does not follow that the Constitution requires absolute freedom and the protection of every utterance. "...[O]bscenity is not within the area of constitutionally protected speech or press." [Roth v. United States (1957), 354 U.S. 476, 1 L.Ed.2d 1498, 1506-7].

The book "Suite 69" does nothing more than depict a number of unrelated scenes dealing with sex in a shocking, morbid and shameful manner. Taken as a whole, the book goes substantially beyond customary limits of candor in description of such matters and is utterly without redeeming social importance. [Penal Code §311; Roth v. United States, supra].

The erotic scenes, which comprise the entire book, recur with increasing intensity and without direction toward any theme or plot. Any attempt at character development is clearly not discernible. The various and frequent sexual acts are graphically depicted and emphatically described. They

include repeated acts of masturbation, oral copulation, voyeurism, lesbianism, homosexuality, sadism and sodomy without any clear reference to a dominant theme. If these acts are omitted from the book, the reader would be left with 180 blank pages. The book is clearly not a clinical, psychological or scientific study of young couples on their honeymoon and the sexual problems that may occur. Respondent respectfully submits that the book "Suite 69" is nothing more than hard core pornography.

Part of petitioner's contention that the book is not obscene boils down to a contention that no book can ever be considered obscene. If this were true, all of the litigation, all of the many opinions rendered by this court, would be meaningless. Although "sex and obscenity are not synonymous", Roth v. United States, 554 U.S. at 487, merely because "Suite 69" deals solely with sex does not mean that it is not obscene. Rather, as was shown by independent review of two municipal court judges, by the jury's verdict based on expert testimony, and by review by the three judges of the Appellate Department of the Superior

Court of the State of California, "Suite 69" is clearly and inescapably nothing more than hard core pornography.

II

NO SUBSTANTIAL FEDERAL QUESTION EXISTS WITH REGARD TO PETITIONER'S CONTENTION THAT THE EVIDENCE PRESENTED FAILED TO ESTABLISH THAT "SUITE 69" IS UTTERLY WITHOUT REDEEMING SOCIAL IMPORTANCE.

Petitioner's contention that the "record is barren of any evidence to establish that the book herein is utterly without redeeming social importance" is incorrect and raises no substantial federal question. The Appellate Department of the Superior Court of the State of California correctly pointed out that competent and sufficient evidence was presented to justify the jury's and the court's conclusion that the book was utterly without redeeming social importance. In California, where circumstances of production, presentation, sale, dissemination, distribution or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with

respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

The above rule, codified in California Penal Code §311(a)(2) [Definitions] subsequent to the date of petitioner's violation but prior to his trial, is plainly a rule of evidence as to one way of proving that matter is utterly without redeeming social importance. It is based on this Court's holdings in Ginzburg v. United States, 383 U.S. 463, 470-473, and A Book v. Attorney General, 383 U.S. 413, 420.

The Appellate Department of the Superior Court of the State of California correctly pointed out that the rule announced by this Court was effective in California from its announcement in 1966, and its subsequent codification in California did nothing more than make this clear; and made it clear also that, in California, it was merely a rule of evidence and could not support some separate type of charge such as pandering.

Petitioner's contention that the only evidence on social value came from a defense witness completely ignores California Penal Code §1127(b), which allows jurors to give

no weight at all to expert testimony if they find it is entitled to none. While respondent recognizes that such will not supply a missing element, when considered together with other competent evidence that the matter is without social value, the utter failure of a defendant attempting to prove social value to do so strengthens the evidence that the matter is utterly without redeeming social importance.

Respondent submits that petitioner has raised no substantial federal question in that the situation involves nothing more than long-standing state rules of evidence.

III

NO SUBSTANTIAL FEDERAL QUESTION EXISTS WITH REGARD TO PETITIONER'S CONTENTION THAT THE APPELLATE DEPARTMENT "DEVISED" A "CONCEPT" OF PANDERING.

Petitioner contends there is no basis in fact to sustain a finding that he engaged in pandering. Respondent submits that whether or not certain evidence was presented, and the inferences implicitly drawn therefrom by the jury, hardly present any federal question.

To say that petitioner was "convicted of pandering" is a gross misstatement of the situation. All the Appellate Department of the Superior Court did was apply existing law, announced by this court in 1966, in determining the sufficiency of the evidence. The Appellate Department did not even apply Penal Code §311(a)(2) in petitioner's case, it merely applied the law of the land and of California as it had existed since 1966, and pointed out that the statute, which was enacted subsequent to petitioner's violation and prior to his trial, was not ex post facto, since it was a codification of existing law.

Petitioner's statements, his reading of a selected portion of the book, to induce the officer to purchase the book, speak for themselves.

IV

CALIFORNIA'S APPLICATION OF STATEWIDE, RATHER THAN NATIONWIDE, CONTEMPORARY COMMUNITY STANDARDS, IS PROPER.

This court has defined obscenity in terms of the average person applying

contemporary community standards. Roth v. United States, 354 U.S. 476. The California Supreme Court has held that the relevant "community" is the entire State of California, and that proof of the standard must be made by the prosecution by expert testimony. In re Giannini, 69 Cal.2d 563, 578. This has resulted in various law enforcement agencies throughout the state conducting "Gallup Poll" type surveys of the entire state; in Los Angeles the surveys are conducted on the average of every six months.

Petitioner contends that Jacobellis v. Ohio, 378 U.S. 184 requires employment of a nationwide standard. This is not so. Four of the justices expressed no opinion on the question of a national standard, two felt a national standard should apply and two disagreed, and one seemingly disagreed.

Respondent submits the arguments against a nationwide standard far outweigh those in favor. For example, it would be a practical impossibility for a prosecutor or law enforcement agency in a small town in California to conduct a survey of the entire nation, which, in the end, very likely would

establish standards much stricter than those existing in the State of California. Respondent submits that the entire state of California is a large enough "community".

It is possible to unreasonably construe this court's holding in Roth v. United States, 354 U.S. 476 in such a way that nothing could possibly be found obscene. It is one thing to say the matter must be utterly without redeeming social importance, and quite another to say the prosecution has the initial burden of proving beyond a reasonable doubt that the matter has no social value whatsoever; such a construction requires the prosecution to prove a negative out of a void, while the defendant, who claims to be "expressing" and "communicating", need put on no evidence as to what area of human culture is encompassed by his "idea".

V

STANLEY V. GEORGIA, 394 U.S. 557 DOES NOT REQUIRE A SHOWING OF SPECIAL CIRCUMSTANCES TO JUSTIFY A PROSECUTION FOR OBSCENITY.

Contrary to his previous argument about "pandering", petitioner feels a concept

should be devised based on his theory of Stanley v. Georgia, 394 U.S. 557, which is that if it is permissible to possess hard core pornography in one's home, it is permissible to sell it, because one must necessarily obtain it before possessing it. This contention was answered by the California Supreme Court in People v. Luros, 4 Cal.3d 84, which called petitioner's theory "highly concatenated". The theory is at best highly unrealistic, and the answer to it is contained in Stanley v. Georgia, 394 U.S. 557, which expressly stated that Roth v. United States, 354 U.S. 476 was still the law.

CONCLUSION

The Petition for Writ of Certiorari does not disclose a clear and convincing showing that there has been a violation of petitioner's rights under the Federal Constitution, or that a state court has decided a federal question of substance not heretofore determined by this court.

There appears no reason why the petition should not be heard or granted.

Respectfully submitted

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